

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Performance Measurements and Standards for	)	
Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting	)	
Requirements for Operations Support Systems,	)	CC Docket No. 98-56
Interconnection, and Operator Services and	)	
Directory Assistance	)	
	)	
Deployment of Wireline Services Offering	)	
Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Association for Local	)	
Telecommunications Services for Declaratory	)	CC Docket Nos. 98-147, 96-98, 98-141
Ruling	)	

**COMMENTS OF THE  
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## SUMMARY

The Competitive Telecommunications Association (“CompTel”) supports the Commission’s proposal to adopt national performance measurements and standards that would apply to the provision of interconnection, access to unbundled network elements (“UNEs”), and collocation by incumbent local exchange carriers (“ILECs”) in states that have not already adopted a generic performance assurance plan of equal or greater rigor. Specifically, the Commission’s requirements should apply only to the operations of ILECs in states where there are no standards or where the state standards are less rigorous or comprehensive than the federal requirements. The states have acquired considerable expertise over the past six years in developing and implementing mandatory performance measurements and standards. As such, the public interest requires that the Commission take actions that will preserve and promote, rather than undermine, the states’ activities in this area. This approach is fully consistent with Section 251(d)(3), which authorizes the states to impose additional or more stringent requirements on the ILECs as long as those requirements are consistent with the requirements of Section 251 and the Commission’s rules and policies concerning local service competition.

If adopted and implemented as proposed by CompTel, national performance measurements and standards would serve the public interest by ensuring that competitive carriers in all states will receive adequate interconnection, UNEs and collocation from ILECs. Further, mandatory national rules would provide a basis for enforcement action against ILECs that are not providing quality wholesale services in a timely manner, and would make it easier for states with limited resources to ensure adequate ILEC performance. National standards also would encourage the more rapid introduction of local service competition in a greater number of markets by better ensuring that a minimum level of wholesale service is available for competitive

carriers nationwide. CompTel supports the model performance measures and standards that have been generated by industry participants, such as those being submitted today by WorldCom.

The Commission should not allow its decision to be undermined by ILEC complaints about undue burdens. Differing state and federal requirements have not been shown to be a problem for the ILECs in other contexts, most notably collocation provisioning intervals and network unbundling requirements. Further, by having the national rules give way in states that adopt a more rigorous regime, the Commission will eliminate any possible concerns about inconsistent federal and state regimes applying in a single state.

Finally, the performance measurements and standards must be strictly and aggressively enforced. The Commission should establish that any violation of the performance rules is *per se* evidence that the ILEC has failed to comply with its obligation under Section 251 to provide wholesale services in a just, reasonable, and nondiscriminatory manner. This would facilitate damages awards against ILECs in Section 208 complaints and interconnection arbitration proceedings. The FCC must also require independent audits of the ILECs' compliance with the performance rules.

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**COMMENTS**

The Competitive Telecommunications Association (“CompTel”), by its attorneys, submits these comments in response to the Notice of Proposed Rulemaking (“Notice”) issued by the Federal Communications Commission (“Commission” or “FCC”) in the above-captioned proceedings.<sup>1</sup> In these proceedings, the Commission is considering whether to adopt certain measurements and standards for evaluating ILEC performance in the provisioning, repair, and maintenance of facilities and services used by competing carriers to provide local services. CompTel is the premier industry association representing competitive telecommunications providers and their suppliers in the United States. CompTel’s member companies include the

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<sup>1</sup> FCC 01-331 (rel. Nov. 19, 2001). The original deadline of December 31, 2001 for submission of comments was extended to January 22, 2002 by Order of the Chief, Policy and Program Planning Division, DA 01-2859, rel. Dec. 7, 2001.

nation's leading providers of competitive local exchange services and span the full range of entry strategies and options.

As discussed below, CompTel supports the Commission's proposal to adopt national performance measurements and standards, but only if the states are not foreclosed from applying additional or more stringent performance requirements on the ILECs if they so choose. The FCC's rules should apply only in states that lack generic performance rules or have rules that are not as comprehensive or rigorous as the federal requirements.

**I. THE COMMISSION HAS AUTHORITY TO ADOPT NATIONAL PERFORMANCE MEASUREMENTS AND STANDARDS.**

CompTel agrees with the Commission that it has authority to adopt national performance measurements and standards.<sup>2</sup> Section 251(c) of the Telecommunications Act of 1996 ("the 1996 Act") imposes a duty on all ILECs to provide interconnection, access to UNEs, and collocation at rates, terms and conditions that are just, reasonable, and nondiscriminatory.<sup>3</sup> The rates, terms and conditions that apply to interconnection, access to UNEs, and collocation are "just and reasonable" if they give the competing carriers a meaningful opportunity to compete.<sup>4</sup> Such rates, terms and conditions are "nondiscriminatory" if they are no less favorable than the rates, terms and conditions that apply to facilities and services that the ILEC provides to

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<sup>2</sup> Notice at ¶ 14.

<sup>3</sup> 47 U.S.C. §§ 251(c)(2), (c)(3), and (c)(6) (1996).

<sup>4</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-339, *Notice of Proposed Rulemaking*, FCC 01-361, rel. Dec. 20, 2001, at ¶ 68, citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15612 (1996) ("*Local Competition First Report and Order*") (subsequent history omitted).

itself or to third parties.<sup>5</sup> Section 251(d) expressly authorizes the Commission to establish the regulations necessary to implement the requirements of Section 251.<sup>6</sup>

In addition, Section 201(b) of the Communications Act of 1934, as amended (“the Act”), gives the FCC the authority to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act. As the Supreme Court found in *AT&T v. Iowa Utilities Board*, those provisions include Section 251.<sup>7</sup> As discussed below, national performance standards and measurements for interconnection, access to UNEs, and collocation are necessary to assure that competing carriers have timely, appropriate, and nondiscriminatory access to the critical services and facilities they need to compete in the market for local telecommunications services. As such, adoption of national performance standards and measurements will further the requirements of and ensure compliance with the local competition provisions of the 1996 Act.

**II. THE COMMISSION SHOULD IMPOSE NATIONAL PERFORMANCE MEASUREMENTS AND STANDARDS WHERE STATE STANDARDS ARE LESS RIGOROUS OR COMPREHENSIVE THAN THE FCC’S REGIME.**

**A. FCC rules should not oust state performance measurements and standards that are consistent with the 1996 Act and the Commission’s rules and policies regarding local competition.**

CompTel supports the adoption of national performance rules to govern states which have not adopted a generic regime of similar or greater scope or rigor. Such an approach is necessary to ensure that states can exercise their statutory right to impose additional or more

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<sup>5</sup> *Local Competition First Report and Order*, *supra* note 4, at 15612.

<sup>6</sup> 47 U.S.C. §§ 251(d) (1996).

stringent performance requirements on the ILECs than those mandated by the FCC. As the Commission has recognized, Section 251(d)(3) grants state commissions the authority to impose additional or more stringent requirements as long as such requirements are consistent with the requirements of Section 251 and the Commission's rules and policies regarding local service competition.<sup>8</sup> There is established precedent for allowing the states to go beyond FCC requirements in this manner in other nationwide rules that concern ILEC provisioning of wholesale services. For example, while the Commission has established a 90-day provisioning interval for physical collocation, the states are allowed to adopt additional requirements, including shorter provisioning intervals, as long as those additional requirements are consistent with the Act and the Commission's implementing rules.<sup>9</sup> Similarly, the states may establish additional unbundling obligations for the ILECs as long as these additional requirements meet the requirements of Section 251 and the policies established by the Commission regarding network unbundling.<sup>10</sup>

Furthermore, the public interest would not be served by supplanting or otherwise shutting down the states' activities regarding performance requirements. State performance rules, and associated fine and forfeiture provisions for violations of those rules, provide incentives for the ILECs to offer wholesale services in a just, reasonable and nondiscriminatory

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(...continued)

<sup>7</sup> *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 378 (1999).

<sup>8</sup> *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 15 FCC Rcd 3696, at ¶ 154 (1999) ("UNE Remand Order").

<sup>9</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 17806, 17810 (2000) ("Collocation Reconsideration Order").



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(...continued)

<sup>10</sup> *UNE Remand Order, supra* note 8, at 3767.

manner. Furthermore, as the Commission recognizes in the Notice, the states have considerable expertise with performance standards and measurements.<sup>11</sup> Several state commissions have devoted considerable resources to the development of state performance rules and continue to work diligently to refine these standards and measurements in light of their own practical experience with ILECs in their states.

Thus, any performance rules adopted by the Commission should function as a floor and not as a ceiling for the states. In order to avoid the possibility that state and federal rules could be inconsistent, CompTel recommends that the FCC's rules apply only in states that lack generic performance rules or have rules that are not as extensive or rigorous as the federal requirements. Such an approach would ensure that minimum performance requirements apply nationwide while allowing states to continue to develop and impose their own rules. Procedures should be adopted to provide the industry clear guidance as to whether the FCC's standards will apply to an ILEC's operations in a particular state. One approach could be to presume that the federal rules apply in all states except where the state commission has adopted its own generic regime of performance measurements and standards. In those states, the FCC should simply adopt the state plan, *in toto*, as the federal plan for that state, in order to provide an independent federal basis for jurisdiction for both carrier-initiated and agency-initiated enforcement actions. Interested parties seeking to replace a state-developed performance monitoring program with the federal minimum reporting obligations could challenge the presumption by submitting a petition for declaratory ruling and the appropriate supporting documentation to demonstrate that the federal standards are more rigorous or comprehensive than the state standards. The FCC would

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<sup>11</sup> Notice at ¶¶ 15, 28.

maintain and publish lists of those states in which the federal rules do and do not apply. This approach is similar to the FCC's approach of publishing a list of foreign carriers that are presumed to have market power in their own countries based on FCC-established criteria.<sup>12</sup>

**B. There is no evidence to suggest that different federal and state performance rules will unduly burden the ILECs.**

The Commission should not allow itself to be swayed by ILEC complaints about the putative burdens of complying with different state and federal performance requirements. Differing state and federal requirements have not been shown to be a problem for the ILECs in other contexts, most notably collocation provisioning intervals and network unbundling requirements. Any modest burdens imposed on the ILECs from having to conform to different standards and measurements in different jurisdictions are outweighed by the attendant benefits. Further, by limiting the national regime to states with no performance rules or a weaker regime, the Commission would avoid the situation where an ILEC is confronted with potentially duplicative, or inconsistent, federal and state requirements within the same state. Moreover, there is a strong federal interest in permitting the states to impose measurements and standards that they believe are necessary to address specific issues or problems in their states. The Commission has previously recognized in other contexts, specifically in establishing network unbundling obligations, the importance of giving the states the flexibility to establish their own rules to accommodate any unique conditions that may exist.<sup>13</sup> Also, state variations in

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<sup>12</sup> See "List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets," DA 99-809, rel. June 18, 1999.

<sup>13</sup> *UNE Remand Order*, *supra* note 8 at 3763, n. 251, citing *Local Competition First Report and Order*, *supra* note 4, at 15625.

performance rules will provide a basis for determining whether the FCC's rules need to be modified. It is impossible to move from monopoly to competition without imposing some burdens on the incumbent monopolists, and the types of performance measurements and standards proposed in the *Notice* embody a reasonable if not modest approach given the critical function performed by such rules in promoting local competition.

**C. Federal performance rules that apply where state rules are missing or less rigorous and comprehensive would serve the public interest.**

If applied to ILEC operations in those states lacking state performance rules or where the rules adopted are not as extensive or as rigorous as the federal requirements, federal performance measurements and standards could assist the Commission in achieving the goals of the 1996 Act, *i.e.*, to promote competition in the local services market to the ultimate benefit of U.S. consumers. Federal performance measurements and standards would provide a basis for taking enforcement action against ILECs that are not providing collocation, UNEs and interconnection in a just, reasonable, and nondiscriminatory manner. Performance rules would simplify the enforcement process for the FCC by making plain precisely what is required of the ILECs under Section 251. In addition, performance rules would make more transparent the extent to which an ILEC is providing wholesale services in a just, reasonable, and nondiscriminatory manner, by permitting direct comparisons between an ILEC's performance in providing wholesale and retail services and between the performances of two different ILECs in providing services to competing carriers.<sup>14</sup> As such, federal performance measurements and standards would facilitate efforts to ensure that the ILECs are providing quality wholesale

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<sup>14</sup> Notice at ¶ 26.

services to competing carriers in a timely manner. If the rules are enforced, they would provide additional incentives to the ILECs to comply with their legal obligations under Section 251.

Adoption of national performance measurements and standards could also facilitate the adoption of new performance rules on the state level. The development of state performance measurements and standards requires state commissions to devote considerable time and resources to the task. If the Commission adopts national performance rules, states with limited resources could simply mimic those rules to establish their own performance measurements and standards. Alternatively, for states that may feel they lack jurisdiction to impose and administer such a plan, the national performance rules would be available to be included in negotiated or arbitrated interconnection agreements, as the Commission has previously noted.<sup>15</sup>

If the FCC's proposed performance rules are adopted and suitably enforced such that the ILECs have adequate incentives to provide quality wholesale services, then the potential benefits of the performance rules for competing carriers and U.S. consumers are significant. The implementation of national performance measurements and standards will help ensure that the ILECs provide a minimum level of wholesale service to competing carriers throughout the country. If a minimum level of wholesale service is available for competing carriers nationwide, they will have the certainty they need to develop and market their products since they will be more readily able to guarantee a minimum level of service to their customers. Assurance of a

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<sup>15</sup> See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 22063 and n.863 (1996) (carriers can include performance and quality standards in their interconnection agreements to ensure that the ILECs satisfy their obligation to provide service in a satisfactory manner).

minimum level of wholesale service throughout the country should enable competitive carriers to develop and implement regional and even national business plans. Competitive carriers also would have a greater opportunity to attract capital, since there will be greater certainty in the financial markets about the ability of competing carriers to attract and retain customers. Thus, the implementation and enforcement of national performance measurements and standards should encourage the more rapid introduction of local service competition in a greater number of markets, thereby making the benefits of competition more widely available to U.S. consumers.

CompTel supports the model performance measures and standards that have been generated by industry participants, such as those being submitted today by WorldCom. The WorldCom measures represent the minimum number of measures and standards that will provide a baseline picture of ILEC provisioning performance for all competitive carriers, regardless of business strategy. The WorldCom measures were developed with input from a variety of industry participants, and are based on "best practices" of many state commissions, which have already implemented these, or similar, measures. This is not to say that the proposed WorldCom measures represent the entire universe of metrics and standards needed by all new entrants, but CompTel endorses the WorldCom measures as the minimum starting point for a well-defined federal list of UNE performance measures/standards.

**III. THE COMMISSION MUST STRICTLY AND AGGRESSIVELY ENFORCE ANY ADOPTED PERFORMANCE MEASUREMENTS AND STANDARDS TO CREATE ADEQUATE INCENTIVES FOR THE ILECS TO PROVIDE QUALITY WHOLESALE SERVICES IN A TIMELY MANNER TO COMPETING CARRIERS.**

The Commission must strictly and aggressively enforce any performance measurements and standards for wholesale services that it adopts in this proceeding. National performance rules will not provide sufficient incentives for the ILECs to comply with their legal

obligations under Section 251 of the 1996 Act if the Commission either chooses not to enforce the rules or does not devote sufficient resources to enforcement. In CompTel's view, the FCC's response to the ILECs' misconduct over the past one to two years has been singularly ineffective.<sup>16</sup>

There is absolutely no reason why the ILECs cannot comply with any performance rules adopted by the Commission. Complying with performance standards and measurements – rules that the ILECs themselves have helped develop – is not rocket science; it does not require extensive research and the development of breakthrough technology. Rather, it requires merely that the ILECs allocate sufficient resources to establish the procedures necessary to ensure compliance. The ILECs will devote adequate resources to complying with performance rules once compliance is made a priority for them, and compliance will become a priority when the fines for noncompliance are so swift, certain, and steep that they are an unacceptable cost of doing business for the ILECs. The fact that the ILECs are repeatedly incurring fines and forfeitures for noncompliance is highly indicative of the fact that the ILECs view these penalties as an acceptable cost of doing business – as a cost of maintaining their monopoly market share.<sup>17</sup>

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<sup>16</sup> For example, as CompTel discussed in its Petition to establish pro-competitive procedures and standards for conducting the three-year review of the national list of UNEs, the Commission denied or failed to act on many of the requests filed during 2001 by CLECs for accelerated treatment of disputes between CLECs and ILECs. Formal complaints filed against ILECs rarely yield swift decisions, and the settlement agreements reached with ILECs through the complaint process are of questionable utility. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Petition of Competitive Telecommunications Assoc., filed Nov. 26, 2001.

<sup>17</sup> Indeed, just last week the Commission found SBC Communications, Inc. ("SBC") liable for a \$6 million forfeiture for willfully and repeatedly failing to provide shared transport  
(continued...)

In adopting performance measurements and standards, the FCC should establish that any violation of the performance rules by an ILEC is *per se* evidence that the ILEC has failed to comply with its legal obligation under Section 251 to provide wholesale services in a just, reasonable, and nondiscriminatory manner. Such a determination would facilitate the filing and successful prosecution of Section 208 complaints against an offending ILEC by an aggrieved competing carrier. Establishing that failure to meet performance metrics is *per se* evidence of the ILEC's failure to comply with the requirements of Section 251 would also assist the competing carriers in their attempts to recover in other fora, such as in federal district court, or commercial arbitration under interconnection agreements.

Finally, the Commission must require mandatory and independent audits of the ILECs' compliance with the performance rules. Without such audits, the Commission will have absolutely no assurance that the data generated and reported by the ILECs is reliable. The Commission's December, 2000 forfeiture proceedings against SBC for failure to comply with certain merger conditions in the SBC/Ameritech merger order demonstrate the need for and the value of an independent audit.<sup>18</sup> In these proceedings, the Commission learned that SBC had failed to report certain performance data in accordance with the published business rules adopted

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(...continued)

on a nondiscriminatory basis to CLECs in the former Ameritech states. *SBC Communications, Notice of Apparent Liability*, File No. EB-01-IH-0030, FCC 02-7, rel. Jan. 18, 2002. *See also SBC Communications, Notice of Apparent Liability*, File No. EB-00-IH-0432, DA 00-2858, rel. Dec. 20, 2000 ("*SBC Communications December 2000 NAL*"); "Verizon Penalties Increase in New York," ZDNet News, Jan 23, 2001, at <http://www.zdnet.com/zdnn/stories/news/0,4586,2677632,00.html>; "SBC to Pay \$1.9M for Missed Performance Goals," TR Daily, Dec. 27, 2001, at <http://www.tr.com/online/trd/2001/td122701.index.html>; "Ameritech Penalized for Service Quality," TR Daily, Dec. 26, 2001, at <http://www.tr.com/online/trd/2001/td122601/index.html>.



in the Carrier-to-Carrier Performance Plan that SBC agreed to undertake as part of the merger conditions as a result of an independent audit.<sup>19</sup>

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(...continued)

<sup>18</sup> *SBC Communications December 2000 NAL, supra* note 17.

<sup>19</sup> *SBC Communications December 2000 NAL, supra* note 17, at ¶6.

**CONCLUSION**

For the foregoing reasons, CompTel urges the Commission to adopt national performance measurements and standards to govern the ILEC's provision of wholesale services in accordance with the principles set forth above.

Respectfully submitted,

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January 22, 2002

## **CERTIFICATE OF SERVICE**

I, Charles “Chip” M. Hines III, hereby certify that a true and correct copy of the foregoing **“CompTel Comments; CC Docket Nos. 01-318, 98-56, 98-147, 96-98, and 98-141”** was delivered this 22<sup>nd</sup> day of January 2002 to the individuals on the following list:

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